

Supreme Court of the United States

October Term, 1976

No. 76-194

SEP 7 1976

MICHAEL ROSAK, JR., CLERK

THE HONORABLE GEORGE W. WHITE, Judge of the
Court of Common Pleas of Cuyahoga County,
Appellant,

vs.

THE STATE OF OHIO on Relation of JOHN T.
CORRIGAN, Prosecuting Attorney of Cuyahoga
County, Ohio,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF OHIO

MOTION TO DISMISS

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STATEMENT OF FACTS

On April 24, 1975, the Grand Jury of Cuyahoga County, Ohio, indicted Richard Kessler for the crimes of aggravated burglary, pursuant to Ohio Revised Code, Section 2911.11(A)(3), and grand theft, pursuant to Ohio Revised Code, Section 2913.02.

On May 7, 1975, Richard Kessler was arraigned, and at that time, entered a plea of not guilty to both charges. The case, designated as CR 19576 was assigned to the Honorable George W. White.

On September 17, 1975, the case was brought to trial and on September 18, 1975, the Honorable George W. White charged the jury relative to the crimes of aggra-

vated burglary and grand theft. On the same day, the jury returned verdicts of guilty against the defendant Kessler with respect to both counts of the indictment.

On September 18, 1975, Judge George W. White, at the time of Kessler's sentencing, refused to sentence the defendant under aggravated burglary, the crime for which he was found guilty, and instead, sentenced him under the burglary statute, Ohio Revised Code, Section 2911.12. Judge White based his actions on his personal belief that no difference exists between aggravated burglary, Ohio Revised Code, Section 2911.11(A)(3) and burglary, Ohio Revised Code, Section 2911.12. Judge White observed:

"It seems to this Court that the definition of 'burglary' under the burglary section of an occupied structure as it is outlined in the indictment in aggravated burglary, is no different than the definition of 'burglary' as the Court has just defined it. Therefore, it was the court's position that even though the jury found and was instructed as to aggravated burglary, the Court can only sentence the defendant under the section for burglary." (A29)

By his actions, Judge White unilaterally, without a motion by defendant Kessler, struck down as unconstitutional, the aggravated burglary statute, that is, Ohio Revised Code, Section 2911.11(A)(3).

Despite pleas by the Assistant Prosecuting Attorney to change his views, Judge White stated that he would continue in the future to sentence individuals convicted of aggravated burglary under the provisions of burglary, Ohio Revised Code, Section 2911.12.

Judge White refused to sentence defendant Kessler for the crime of aggravated burglary for which he was

convicted, and instead sua sponte, reduced the aggravated burglary verdict on his own motion to the lesser charge of burglary, Ohio Revised Code, Section 2911.12. Judge White proceeded to sentence Kessler under the burglary section, *a crime Kessler was not convicted of*.

On November 6, 1975, a mandamus action was filed in the Ohio Supreme Court by the Prosecuting Attorney of Cuyahoga County requesting that the Ohio Supreme Court issue a writ of mandamus compelling appellant to sentence Kessler for the crime he was convicted of.

On April 21, 1976, the Ohio Supreme Court issued a writ of mandamus against the appellant, stating:

"Therefore, respondent, not having shown authority to modify the verdict, is under a clear legal duty to sentence according to the verdict returned by the jury. Writ allowed." (Emphasis added) (A4)

On April 28, 1976, appellant Judge White, seven days after the writ of mandamus was allowed, issued a supplemental journal entry (A11).

On April 30, 1976, appellant Judge White, filed in the Ohio Supreme Court a motion for rehearing.

On May 4, 1976, the Prosecuting Attorney of Cuyahoga County opposed the motion for rehearing.

On May 13, 1976, the Ohio Supreme Court denied the motion for rehearing (A6).

On May 26, 1976, a Notice of Appeal to the Supreme Court of the United States was filed (A7).

On July 15, 1976, after appellant's request for stay of the order of the Supreme Court of Ohio pending appeal was denied, per Mr. Justice Stewart, Kessler was resentenced by the appellant for the crime of aggravated burglary (A14).

**THE APPELLANT'S APPEAL PURSUANT TO TITLE
28 U.S.C., SECTION 1257(2) MUST BE DISMISSED
FOR LACK OF A SUBSTANTIAL FEDERAL
QUESTION.**

Appellant's contentions are unmeritorious. Therefore, pursuant to Rule 16(1)(b) of the Rules of the United States Supreme Court, appellee moves this Court to dismiss appellant White's appeal for lack of a substantial federal question, and because the judgment of the Ohio Supreme Court rests on an adequate non-federal basis. Rule 16(1)(b) provides:

"The Court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question presented to be reviewed was not timely or properly raised, or expressly passed on; or that the judgment rests on an adequate non-federal basis."

It is well established that in cases emanating from state courts, the Supreme Court will not review state court judgments if it appears that state court judgments rest on an independent non-federal ground adequate to support it. See, *Johnson v. State of New Jersey*, 384 U.S. 719, 735, 736 (1966); *Black v. Cutter Laboratories*, 351 U.S. 292, 297, 298 (1956). Thus, state procedural regulations which satisfy due process bar review by the United States Supreme Court.

Since the decision of the Ohio Supreme Court in this case relies on an interpretation of Ohio Criminal Rules 33(A) and 52(B) (A3, A25), and these rules have not been challenged as violative of due process, the Ohio Supreme Court's decision in this case rests on adequate state grounds and no substantial federal question is presented for review.

Therefore, both issues raised by appellant should be dismissed for failure to raise a substantial federal question.

Furthermore, as to issue one, that issue was never raised in the court below, thus precluding review by the United States Supreme Court. See, *Herndon v. Georgia*, 295 U.S. 441 (1935).

CONCLUSION

Respectfully, it is requested that appellee's motion to dismiss be granted since the Ohio Supreme Court's decision in *State ex rel., John T. Corrigan v. White*, 46 Ohio St. 2d 29 (1976) rests on adequate state grounds and no substantial federal question is presented for review.

Respectfully submitted,

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